Decision 03-05-038 May 8, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of San Diego Gas & Electric Company (U-902-E) for a Certificate of Public Convenience and Necessity Valley-Rainbow 500kV Inter-Connect Project.	Application 01-03-036 (Filed March 23, 2001)

ORDER DENYING REHEARING OF DECISION (D.) 02-12-066

I. SUMMARY

By this Order, the California Public Utilities Commission ("Commission") denies the Applications for Rehearing of Decision 02-12-066 ("Decision") filed by San Diego Gas & Electric Company ("SDG&E") and the California Independent System Operator ("ISO").

II. BACKGROUND

In the Decision, we determined that SDG&E will continue to meet established reliability criteria under conservative supply and demand forecasts within the adopted five-year planning horizon, and therefore, the Valley-Rainbow Interconnect Project ("Project") is not needed for reliability purposes. D.02-12-066 also concluded that the projected costs for this Project exceeded the projected benefits and therefore, the Project cannot be justified on economic grounds. Accordingly, D.02-12-066 denied without prejudice SDG&E's application for a certificate of public convenience and necessity ("CPCN") to construct the proposed Project.

SDG&E filed Application (A.) 01-03-036 on March 23, 2001 seeking a CPCN to construct additional transmission capacity to provide an interconnection between SDG&E's existing 230 kV transmission system and Southern California Edison Company's ("SCE") existing 500 kV transmission system. In the Commission's Scoping Memo, this proceeding was split into two phases: (1) in the First Phase, the Commission would address the issue of whether the Project was needed; and (2) in the Second Phase, the Commission would consider Project alternatives and routing. (See August 13, 2001 Assigned Commissioner's Ruling Establishing Category and Providing Scoping Memo in Compliance with Article 2.5, SB 960 Rules and Procedures.) Therefore, SDG&E was required to prove that there was a need for the Project before we considered project alternatives and routing.

SDG&E and the ISO filed applications for rehearing of D.02-12-066. In their rehearing applications, both SDG&E and the ISO raised the following arguments: (1) the Commission must defer to the ISO's finding of need; and (2) the Decision improperly ignores key portions of the factual record regarding the Commission's adoption of a new five-year planning horizon. SDG&E makes the additional arguments that: (1) the Commission erred in its count of existing in-basin generation, and had the Commission rectified this mistake, the Project would have fallen within the adopted five-year planning horizon; (2) the Decision erroneously ignored important evidence with respect to Calpine's proposed Otay Mesa Plant; (3) the Decision ignores substantial evidence that new generation will replace older generation resulting either in no net gain of resources or forcing SDG&E's customers to pay increased reliability must-run costs to prevent plant closures; and (4) the Decision erred in dismissing SDG&E's and the ISO's showing of economic benefits associated with the Project. The ISO also contends that the Decision failed to consider evidence of pessimistic sensitivities.

Save Southwest Riverside County ("SSRC"), the City of Temecula, and the Pechanga Development Corporation (collectively "Community

Intervenors"), the Office of Ratepayer Advocates ("ORA"), Centex Homes, and Pacific Gas & Electric Company ("PG&E") all filed responses to the applications for rehearing. Community Intervenors, ORA and Centex Homes oppose the applications for rehearing, and PG&E supports the applications for rehearing.

III. DISCUSSION

A. Jurisdiction Over Need Determinations.

Both SDG&E and the ISO believe that we do not have the authority to make an independent assessment of need, particularly one that contradicts the ISO's need determination. The ISO contends that we failed to give due consideration to its need determination. (ISO App. for Rehearing at 5.) Likewise, SDG&E claims that we must give complete deference to the ISO's need determination. In its application for rehearing, SDG&E stated that "[t]he Commission has no authority to second-guess the ISO's determination that the Project is necessary for the transmission system's reliability . . . " because the Commission is preempted by federal law and lacks the statutory authority to make an independent assessment of need under state law. (SDG&E App. for Rehearing at 5.) SDG&E and the ISO are essentially making the same argument. Both SDG&E and the ISO argue that the ISO has exclusive jurisdiction to make need determinations for the granting of the CPCN and we only have the authority to consider routing and siting issues for purposes of granting a CPCN.

The Applicants are wrong on both counts. First, contrary to the Applicants' assertions, we carefully considered the ISO's determination of need. Second, Applicants' argument that we must, under all circumstances, adopt the ISO's determination of need is wrong for the reasons discussed below.

1. Public Utilities Code Section 1001 and AB 1890.

The ISO argues that Assembly Bill No. 1890 (Stats. 1996, Ch. 854) ("AB1890") transferred responsibility for grid reliability and transmission planning from the investor-owned utilities ("IOUs") and the Commission to the

ISO. AB 1890, however, did not repeal Section 1001 of the Public Utilities Code ("Section 1001"). We have an ongoing statutorily mandated duty to determine whether a major transmission line is needed pursuant to Section 1001. (See D. 02-12-066 at 7.) In relevant part, Section 1001 states:

> . . . [n]o gas [or] electrical corporation . . . shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

(Pub. Util. Code, § 1001.) Clearly, Section 1001 requires us to decide if a proposed transmission project is necessary. Thus, we have an independent statutorily mandated duty pursuant to Section 1001 to ensure that this Project is necessary.

The ISO and SDG&E rely on several portions of AB 1890 to support their arguments that we no longer have the authority to make need assessments for transmission projects. In particular, the Applicants are concerned with Section 345 of the Public Utilities Code, which states that "[t]he Independent System Operator shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council." (Pub. Util. Code, § 345.) The Applicants also point to Public Utilities Code Section 334, which states that "[t]he proposed restructuring of the electric industry would transfer responsibility for ensuring short- and long-term reliability away from electric utilities and regulatory bodies to the Independent System Operator." (Pub. Util. Code, § 334.) Finally, the Applicants look to Section 346, which states that the ISO "shall immediately participate in all relevant [FERC] proceedings." (Pub. Util. Code, § 346.)

The Applicants' argument fails to consider portions of AB 1890 that gave us specific new powers over need for transmission and reliability of the grid.

Public Utilities Code Section 330(f) ("Section 330(f)") confirms our ongoing authority regarding the utility's transmission system. This statutory provision specifically states: "the delivery of electricity over transmission and distribution systems is currently regulated, and will continue to be regulated to ensure system safety, reliability, environmental protection, and fair access for all market participants." (Pub. Util. Code, § 330, subd. (f).) In D.99-09-028, we examined the extent of our jurisdiction over reliability of the transmission grid in light of AB 1890. We found that Section 330(f) "affirms the Commission's ongoing role in regulating the transmission system for the purpose of ensuring reliability, safety, and other goals, and . . . AB 1890 did not modify the Commission's traditional sources of jurisdiction over reliability . . . ." (D.99-09-028 at 6; 1999 Cal. PUC LEXIS 635 at 16.) D.99-09-028 also observes that AB 1890 did not:

> . . . strip the Commission wholesale of its historic jurisdiction over reliability of the utilities' distribution systems, notwithstanding the broad language used in § 334. In fact, AB 1890 gave the Commission specific new duties related to distribution system reliability in § 364, akin to the specific duties required of the ISO under sections 348 and 349. Moreover, AB 1890 did not repeal the statutes, such as § 761 et seq., under which the Commission has exercised jurisdiction over transmission facilities, services, and reliability.

(*Id.*)

Thus, the emphasis in AB 1890 is on the ISO's responsibility for the operation of existing resources. There is a presumption that the Legislature was aware of other statutes giving our jurisdiction over need and reliability, and the fact that these statutes were not repealed shows that the responsibility for operation of existing resources is shared with us. AB 1890 does not give the ISO the authority to make need determinations as required in Section 1001.

The Applicants argue that because AB 1890 gave the ISO the responsibility for reliable operation of the grid, this also necessarily gives the ISO the authority to determine when the grid needs to be expanded. (See ISO App. for

Rehearing at 6.) According to the Applicants, we only have the power to consider routing and related issues. (See SDG&E App. for Rehearing at 12-14; ISO App. for Rehearing at 4-8.) The statutes do not support this interpretation.

While the language of the statutes gives the ISO the authority and responsibility for the reliable operation of the grid, the plain language of AB 1890 does not negate our statutorily mandated responsibility, in determining whether to grant or deny a CPCN, to make a need determination pursuant to Section 1001. There is nothing to prevent us from considering as part of our need assessment the ISO's reliability determination of need. This demonstrates the importance of the ISO's participation in CPCN proceedings. The Legislature did not modify Section 1001, and had the Legislature intended to transfer our jurisdiction to make need determinations to the ISO, it would have done so expressly.

In the absence of explicit Legislative intent to repeal Section 1001, at least insofar as AB 1890 applies, we have a statutory mandate to consider need and reliability as set forth in the statutes discussed above. While our role in the transmission system has certainly changed since the passage of AB 1890, AB 1890 did not strip away our independent sources of authority over the transmission system.

2. The Commission's Broad Authority.

Courts have liberally construed our statutory and constitutional authority. The California Supreme Court has stated that:

> The commission is a state agency of constitutional origin with far-reaching duties, functions and powers. The Constitution confers broad authority on the commission to regulate utilities . . . [t]he commission's powers, however, are not restricted to those expressly mentioned in the Constitution: the Legislature has *plenary power* . . . to confer additional authority and jurisdiction upon the commission . . . the Public Utilities Act . . . vests the commission with broad authority to supervise and regulate every public utility in the State and grants the commission numerous

> specific powers for the purpose. Again, however, the commission's powers are not limited to those expressly conferred on it: the Legislature further authorized the commission to *do all things*, whether specifically designated in the Public Utilities Act *or in addition thereto*, which are necessary and convenient in the exercise of its jurisdiction over public utilities.

(*San Diego Gas and Electric Co. v. Superior Court of Orange County* (1996) 13 Cal. 4th 893, 914-915.)

Unlike the Commission, the ISO does not have broad statutory or constitutional authority. In light of the fact that California courts have determined that we have broad statutory and constitutional powers, the Applicants' claim that AB 1890 implicitly shifted a great part of our jurisdiction to the ISO is unreasonable.

3. Harmonization of Statutes & Concurrent Jurisdiction.

The Applicants claim that Sections 345, *et seq.* and Section 1001 conflict over which entity has the authority to make need determinations, and therefore, we should harmonize the statutes by giving "special deference" to the ISO's determination of need.[1] The Applicants argument fails for two reasons.

First, there is no conflict between the relevant sections of the Public Utilities Code in this proceeding. The Public Utilities Code specifies that the Commission shall consider need in its CPCN proceedings. The language of the statutes also indicates that the ISO has the responsibility to operate the existing grid, along with other actions specified by the Legislature. There is no express conflict raised by the statutes giving the Commission jurisdiction over need and reliability and the sections authorizing the ISO to operate the transmission system. As discussed above, in enacting AB 1890, the Legislature provided for concurrent jurisdiction to both the ISO and the Commission over reliability determinations.

[1] Judging from the Applicants' arguments, this is more than usual deference. Deference, as used by Applicants, appears to mean that the Commission must always accept the ISO's need assessment.

(See Pub. Util. Code, §§ 330, subd. (f) & 345.) Therefore, the arguments that we should harmonize our jurisdiction with the ISO's jurisdiction are not applicable to this proceeding.

Second, even if the relevant statutes conflicted, the Applicants' reasoning is flawed. SDG&E and the ISO argue that in order to harmonize the roles of the Commission and the ISO, we must rely on the ISO's determination of need. Under the Applicants' interpretation, Section 1001 would essentially be read out of the Public Utilities Code. Further, the Applicants' interpretation would require us to abandon our statutorily mandated duty to make a need determination under Section 1001. However, the basic principles of statutory interpretation indicate that this is not true.

Under the laws of statutory interpretation, when there is an obvious conflict between two statutes, a court must give effect to both statutes, if at all possible. (D.99-09-028 at 6; see *San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal. App. 4th 785, 793.) In D.02-10-065 and D.02-10-066, we discussed harmonization of statutes in cases of conflict preemption in response to PG&E's argument that federal law preempted us from making a need determination. In both D.02-10-065 and D.02-10-066, we stated that, "[c]onflict preemption does not apply because the ISO and the Commission have concurrent jurisdiction to make a need determination pursuant to their statutory mandate." (D.02-10-065 at 7-8; D.02-10-066 at 6.)

The ISO determines need for purpose of reliability and the Commission considers need for a project for the purpose of granting or denying the CPCN. These determinations are not necessarily inconsistent. Even assuming that there is a conflict, the determinations can be harmonized by interpreting the statutes that give each authority to make a determination of need. As discussed above, the statutes can be interpreted as providing concurrent jurisdiction. Thus, the ISO can make a determination of reliability that can be factored into our determination of need with respect to the granting or denial of the CPCN. We

could thus give deference to the ISO's determination of need based on reliability. However, deference does not mean that we do not perform an independent need assessment for purposes of determining whether to approve or reject a CPCN application. Deference means weighing the ISO's reliability need determination along with other record evidence, such as costs and alternatives, in the determination of need under Section 1001.

Indeed, we have and will continue to examine the ISO's need determination with careful consideration. However, if the weight of the evidence indicates that there is no need for a particular project, then we have the authority and the statutory duty to make a finding of no need. Because there is no express conflict between AB 1890 and Section 1001, and because, in any case, the statutes can be harmonized, the Applicants' arguments lack merit.

4. Federal Preemption.

SDG&E argues that FERC's approval of the ISO and its tariff reduced our authority and responsibility to make need determinations for transmission projects.[2] SDG&E states that "[i]n creating the ISO and ordering it to submit to FERC jurisdiction, California permanently ceded any separate jurisdiction it may have had over California's transmission system to FERC." (SDG&E App. for Rehearing at 7.) SDG&E relies on numerous decisions in support of this argument. (See SDG&E App. for Rehearing at 5-11.) None of these decisions support the SDG&E's position regarding the limited scope of our jurisdiction to make need determinations. None of the decisions discuss the ISO having sole jurisdiction over need determinations or a shift of the Commission's jurisdiction over need assessment to the ISO.

SDG&E makes the additional argument that FERC's approval of the ISO tariff occupied the field and therefore, we are preempted from making a need

[2] The ISO stated in its Application for Rehearing that "[s]ince state and federal law are in accord as to CA ISO responsibility for transmission planning it is unnecessary to discuss federal preemption issues." (ISO App. for Rehearing at 7.)

determination. In field preemption, "[s]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy. (*Peatros v. Bank of America NT&SA* (2000) 22 Cal. 4th 147, 157 (citations omitted).)

SDG&E has not supported its argument that in approving the ISO tariff, Congress intended that FERC occupied the field to the exclusion of the states. To the contrary, the Federal Power Act specifically reserves transmission siting to the states. Also, in Order 888, FERC specifically noted that in unbundling transmission and generation rates, states retained authority over reliability and need for new transmission. (61 F.R. 21540 (May 10, 1996) Order 888 at 31, 689 ("Order 888"); see also *New York v. Federal Energy Regulatory Comm***.** (2002) 535 U.S. 1, 12, 13, fn. 8.) In addition, there is nothing in the language of the ISO tariff which indicates that the ISO has sole jurisdiction over need determinations, or that our jurisdiction to make need assessments pursuant to Section 1001 has shifted to the ISO.

More recently, FERC noted in connection with its approval of certain rate treatments for a transmission project known as Path 15 that the approval of these rate treatments ". . . merely allowed the project to go forward to the next stage and do not prevent the California Commission or other appropriate state or local authorities from making whatever evaluation of need they are legally authorized to make, and taking whatever action they are legally authorized to take, if they find that the facilities are not needed." (Western Area Power Administration, "Order Denying Rehearing" (2002) 100 FERC ¶ 61,331.) With D. 02-12-066, we undertake, as the FERC has recognized we may, those actions that we "are legally authorized to take, if [we] find that [] facilities are not needed."

We properly exercised our authority over evaluating need and considered the testimony of the ISO in this proceeding. The complete deference desired by SDG&E and the ISO was not appropriate in this case because the ISO's

determination was based on incomplete and inaccurate information. For all of these reasons, we are not preempted by federal law from making need determinations.

5. CEQA.

The Applicants both argue in their applications for rehearing that CEQA does not support our jurisdiction for a need determination. SDG&E and the ISO appear to be making this argument on this basis of two previous Commission decisions where we found that CEQA provided an independent basis of authority to make need determinations. (See D.02-10-065; D.02-10-066)

The Decision does not rely on CEQA to support its determination that the Commission has the jurisdiction to make an independent need assessment. The Decision does not even cite to CEQA. Therefore, the Applicants' arguments are irrelevant because the Decision does not base the Commission's authority to make a need determination in this case on CEQA.

6. Policy Arguments.

SDG&E and the ISO both argue that we should defer to the ISO's assessment of need for policy reasons as well. The ISO contends that public policy requires the Commission "to develop a sensible approach to transmission planning and expansion and to cooperate to promote an efficient and expeditious process for the approval of necessary transmission projects." (ISO App. for Rehearing at 13.) The ISO further argues that "[a] failure on the part of the CPUC to accord proper weight to the transmission planning work of the CA ISO will have serious adverse consequences." (ISO App. for Rehearing at 13.) In particular, the ISO is concerned about duplication of efforts. (ISO App. for Rehearing at 13.) The ISO also believes that the Commission's action "creates the potential for inconsistent results in different forums, leading to a lack of finality." (ISO App. for Rehearing at 13.) Likewise, SDG&E asserts that for public policy reasons, the Commission should defer to the ISO in order to avoid duplication of

work and to be more "cooperative" with the ISO. (SDG&E App. for Rehearing at 21.)

The public policy reasons presented by SDG&E and the ISO support deference to the ISO's determination of need. However, deference that consists of adopting the ISO's need assessment without conducting an independent review cannot substitute for our mandate to consider need for the Project under Section 1001. Our CPCN process is a trial type proceeding that allows us to reach an unbiased decision. As discussed above, greater deference could not be given because the ISO's process for determining need for the Project was based on an incomplete record and does not take into account new information developed in our proceeding. Where, as here, we determine that the evidence does not support the project, we must exercise our independent judgment. In this case, the deference that the ISO and SDG&E urge upon us would amount to rubber-stamping the ISO determination. This would be particularly inappropriate, given the strong advocacy role played by the ISO in the Project proceeding. This level of deference called for by applicants would constitute an unlawful delegation of our authority, giving the ISO power that the Legislature has not bestowed on it.

In short, the public policy reasons cited by the ISO and SDG&E do not excuse us from exercising our authority to make an independent assessment of need under Section 1001. Therefore, the Applicants' public policy arguments do not constitute legal error nor are they persuasive.

B. Five-Year Planning Horizon.

In the Decision, we carefully analyzed the question of what is the appropriate time horizon over which to assess the need for the Project. We determined that a five-year planning horizon was appropriate for this proceeding for several reasons, including: (1) SDG&E's Application was based on a five-year planning horizon; (2) the ISO's own transmission planning process applied a five-year planning horizon; (3) if we adopted a ten-year planning horizon, we would always find a need for transmission capacity expansion because we would not be

able to count on new resources coming on-line; and (4) adopting a longer planning horizon could result in a major investment in a project that was not needed. (D.02-12-066 at 14-17.)

Both the ISO and SDG&E characterize the Decision's five-year planning horizon as setting forth a new policy. SDG&E claims that the Decision will "virtually ensure that no new major transmission infrastructure projects are built in California in time to solve the reliability issues they are intended to address." (SDG&E App. for Rehearing at 25.) The ISO asserts that the Decision creates a "strict five year cut-off" that will discourage utilities from proposing needed transmission projects. (ISO App. for Rehearing at 16-18.)

The Applicants mischaracterize the scope of the Decision. We stated in the Decision that "[w]e agree with the ISO that this planning horizon should not be mechanistically applied but rather requires the exercise of judgment, based on the facts of each project before us." (D.02-12-066 at 17.) The Decision clearly says that the five-year planning horizon applies only to this proceeding, and that we will determine the appropriate planning horizon for future transmission projects on a case-by-case basis.

There is sufficient evidence in the record to support our determination that a five-year planning horizon is appropriate in this proceeding. We weighed all of the arguments, but ultimately determined that a five-year planning horizon was proper because it has "a much better understanding of what is reasonably expected during that time frame." (See D.02-12-066 at 17.) Therefore, no legal error was committed.

C. Count of Existing In-Basin Generation.

SDG&E contends that we erred in its count of existing in-basin generation and that if the count had been done properly, the Project would have fallen within the five-year planning horizon adopted in the Decision. SDG&E's claim hinges on two arguments: (1) that the Commission erred by not taking official notice of information regarding a Duke Energy transmission plant. Had

the Commission taken this information into consideration, the Project would have fallen within the adopted five-year planning horizon; and (2) the Commission made errors in its count of existing in-basin generation.

1. SDG&E's Request for Official Notice.

SDG&E claims that our failure to take official notice of a document containing information about a Duke Energy unit regarding the in-basin generation count. The request for official notice was presented in a footnote of an ex parte communication dated December 13, 2002, a few days before we were scheduled to vote on the proposed Valley Rainbow Decision. SDG&E's request for official notice was late and was not filed according to proper procedure. (See Commission's Rules of Practice and Procedure.) SDG&E's argument that we committed legal error by not taking official notice of information regarding a Duke Energy transmission plant is without merit because it was a procedurally deficient request.

Even if SDG&E had followed proper procedure by filing a petition to set aside submission, we had the discretion to decide whether to take official notice of the documents attached to the petition or not. Rule 73 of the Commission's Rules of Practice and Procedure ("Rule 73") states: "Official notice **may** be taken of such matters as may be judicially noticed by the courts of the state of California." (emphasis added). In addition, Public Utilities Code Section 1701 ("Section 1701") discusses the Commission's authority over its own procedures. Section 1701 states, in part: "(a) All hearings, investigations, and proceedings shall be governed by this party and by the rules of practice and procedure adopted by the commission, and in the conduct thereof of the technical rules of evidence need not be applied." (Pub. Util. Code § 1701.)

We properly exercised our discretion in declining to take official notice of the document regarding Duke Energy. Therefore, there is no legal error.

2. RAMCO Contracts.

SDG&E contends that we ignored evidence that a contract with PG&E's National Energy Group (RAMCO) would expire in 2003, and that there was no indication that it would be renewed. SDG&E also claims that we "failed to acknowledge the upcoming expiration of the lease for the south bay units." (SDG&E App. for Rehearing at 31.) These assertions lack merit.

In the Decision, we recognized that the existing contracts between RAMCO and the ISO "are three-year contracts, which expire in 2003." (D.02-12-066 at 20.) We acknowledged SDG&E's position that the ISO is not currently negotiating with RAMCO to extend these contracts. (*Id.*) The ISO, on the other hand, noted in its brief that it "considers . . . RAMCO units through 2008 . . . the most likely." (D.02-12-066. at 21.) In addition, a letter from RAMCO to the ISO states:

> SDG&E has incorrectly indicated that the RAMCO projects will not be available after 2003. There is no factual basis for this assumption. RAMCO intends to not only bid these existing two units this year in the RMR process, but each year for the foreseeable future.

(See Exhibit 311.)

Thus, we acknowledged the disparate views and noted that there are conflicting opinions regarding the status and the future of the RAMCO contracts with the ISO. Moreover, we recognized that the Applicants did not present us with sufficient evidence that the Bay units will retire. In addition, SDG&E failed to demonstrate that the RAMCO units are less efficient than other similar units in and around San Diego, a fact that could be determinative in removing it from the "resource mix." (D.02-12-066 at 22.) For these reasons, we concluded that the RAMCO units should be considered as part of the available capacity. The Decision reflects the weight of the record evidence and therefore, no legal error was committed.

SDG&E also claims that we ignored important evidence regarding Duke Energy's lease for the South Bay site, namely, that it will expire in 2009. Contrary to SDG&E's contention, the Decision recognizes that at the present time Duke Energy's lease for the South Bay site is set to expire in 2009, which is well beyond the five-year planning horizon from 2001-2006. (See D.02-12-066 at 24.) We noted that "SDG&E and the ISO offer no specific guidance on when or how much capacity should be removed from the forecast to account for potential retirements or displacement." (D.02-12-066 at 24.) The Decision also acknowledged Community Intervenor's contention that the expiration of a lease does not necessarily mean that a plant will retire. (D.02-12-066 at 24.)

Moreover, SDG&E stated in its own testimony that expiration of the lease does not imply loss of capacity, and also stated that Duke Energy is proposing to construct new generating units in the same area. (D.02-12-066 at 24.) The ISO has also stated that "industry convention is that, until a generating unit officially announces its retirement, it is assumed to be available in planning studies." (D.02-12-066 at 24; see also Exhibit 101 at 6:1-2.)

Accordingly, in the Decision we disagreed that "the sole fact that a generating unit is not designated must-run should eliminate it from the generating mix available to serve San Diego customers." (D.02-12-066 at 25.) Because the record evidence did not support exclusion of 91 MW of capacity associated with the RAMCO units, no legal error was committed.

D. Calpine's Otay Mesa Plant.

SDG&E claims that we ignored important evidence showing that Calpine's Otay Mesa plant was not currently under construction, and therefore, we erred by concluding in the Decision that Otay Mesa will be built because there was not sufficient evidence to support this conclusion. (SDG&E App. for Rehearing at 32-33.) As a result, SDG&E contends that we should re-open the proceeding, and move to Phase 2. (SDG&E App. for Rehearing at 32-33.) SDG&E also argues that we erred by concluding that the Calpine-DWR Contract would "likely

compel" Calpine to construct Otay Mesa. (SDG&E App. for Rehearing at 34.) SDG&E's arguments relate to how we weighed the evidence, which the courts will not disturb.

We did not ignore important evidence regarding the construction of Otay Mesa. On the contrary, the Decision recognized that there is conflicting evidence about when Otay Mesa will be on-line. (See D.02-12-066 at 27-31.) We also took into account SDG&E's arguments that the language of the contract does not compel Calpine to construct Otay Mesa and that Otay Mesa is not under construction. However, other evidence in the record indicated that Otay Mesa will be available to serve load in 2005 and beyond, which is within the established five-year planning horizon. (See D.02-12-066 at 29-31; see also Exhibit 303 at 2 SSRC Opening Brief at 42-48.) Also, there was record evidence indicating that the contract to build Otay Mesa does ensure that Otay Mesa will be built. (*Id.*) Because there is substantial evidence in the record to support our conclusion, no legal error was committed.

SDG&E bases its argument that there is not substantial evidence in the record to support inclusion of Otay Mesa in the load forecast, in part, on our failure to take official notice of an exhibit that purports to support its position that Otay Mesa should not be considered available for transmission planning purposes. The Commission denied the motion to accept the exhibits into evidence because we noted that "SDG&E should have filed a petition to set aside submission to allow all parties the opportunity to brief the taking of official notice and what weight the information should be accorded." (D.02-12-066 at 26, fn. 10.) As previously noted, Rule 73 states that we have discretion to take official notice of matters over which the California Courts may take judicial notice, and Section 1701, we have authority over our own procedures. For the aforementioned reasons, SDG&E's argument lacks merit.

E. Evidence of Economic Displacement.

SDG&E claims that we ignored substantial evidence that "all the new generation will do is displace an equal amount of the old, inefficient generation in SDG&E's service territory." (SDG&E App. for Rehearing at 39.) SDG&E also argues that we ignored evidence of the possibility of greatly increased RMR costs to prevent plant closures. (SDG&E App. for Rehearing at 42.) Again, SDG&E's arguments relate to how we weighed the evidence, which the courts will not disturb.

As we elucidated in our Decision, it is standard industry practice to count existing generation until retirement is announced. The record indicates that neither SDG&E nor the ISO provided any evidence that would establish the level and timing of retirements that we should have considered in determining the reliability outlook. Moreover, SDG&E's contention that we ignored evidence of increased RMR costs is not relevant to a need analysis. Therefore, this argument lacks merit.

F. The Applicants' Showing of Economic Benefits Associated with the Project.

The Decision found that the Project would not find reliability benefits in the five-year planning horizon, and therefore, the Project must be justified on the basis of economic benefits. SDG&E argues that we failed to give proper consideration to the Applicants' evidence of economic benefits associated with the Project by arguing that: (1) societal costs of outages are huge; (2) the Project would consider significant market power mitigation benefits; (3) the Project would provide an incentive for the development of new generation; and (4) the Decision understated the economic benefits of the Project.

SDG&E's contention that we did not sufficiently take into account the societal costs of electricity outages and the economic benefits the Project could generate by preventing these outages is ill-conceived because we determined in the Decision that there is no reliability need for the Project. We appropriately

considered SDG&E's second argument, that the Project would consider significant market power mitigation benefits in the Decision. (See D.02-12-066 at 63-70.) However, we rejected this argument because the ISO did not conduct a study of the cost-effectiveness of the Project and the Applicants did not try to "quantify the market power mitigation value they claim accrues from the project." (See D.02-12-066 at 70, fn. 23.) SDG&E's contention that the Project would provide an incentive for the development of new generation has no support in the record. Lastly, the Decision did not understate the economic benefits of the Project. We did not rely on SDG&E's economic analysis to conclude that the Project offered some economic benefit because SDG&E's calculations were found to be unreliable. Therefore, no legal error was committed.

G. Ignoring Pessimistic Sensitivities.

The ISO claims the Decision "ignores the factual record in considering only optimistic sensitivities and not considering pessimistic ones." (ISO App. for Rehearing at 18.) In particular, the ISO argues that: the Decision disregards (1) evidence regarding the potential retirements of existing generation; (2) the possibility for a more forceful load rebound than SDG&E projections; and (3) the potential the Mexico will persist in importing energy from California rather than exporting energy to California. (ISO App. for Rehearing at 18.)

1. Retirement of Existing Generation.

The ISO contends that the Decision does not include any "adjustment in the 'reasonably foreseeable forecast' scenario for the retirement of generation, and includes no sensitivity analysis that recognizes the possibility of generating unit retirement." (ISO App. for Rehearing at 19.) The ISO argues that the fact that the Applicants were not able to specify contemplated retirements is not sufficient reason for overlooking the potential for retirements. (ISO App. for Rehearing at 19.)

The ISO requests in its application for rehearing that we take administrative notice of a Duke Energy document filed with FERC. For us to do so would require setting aside submission and reopening the proceeding to provide the ISO the opportunity to relitigate the case. For reasons previously discussed, we deny this request.

2. Rebound of SDG&E's Load Forecast.

The ISO is concerned that, as D.02-12-066 points out, "SDG&E experienced the largest one-year decline in its load in 50 years and there is no historical precedent to provide direction about how load will rebound from the 2001 level." (ISO App. for Rehearing at 21.) There is nothing in the record to support the ISO's argument.

In the Decision, we adopted SDG&E's load forecast after weighing all of the evidence. Both SDG&E and the ISO supported the adoption of SDG&E's demand forecast. SDG&E stated in its Opening Brief that its load forecast for October 2001 is conservative "given that it experienced its largest one year decline in load in 50 years during 2001 which will contribute to a faster than average growth rate in the near term. (D.02-12-066 at 49; SDG&E Opening Brief at 19.) The ISO relied on SDG&E's demand forecast when it made its need assessment for the Project. In its Opening Brief, the ISO determined that the evidence of consumption growth between October 2001 and April 2002 "strongly supports use of SDG&E's forecast." (D.02-12-066 at 50; ISO Opening Brief at 6.) SSRC supported a lower load forecast. However, we rejected the SSRC's position. (D.02-12-066 at 51.) We noted that "[n]o party has presented an alternative forecast to SDG&E's, so we rely on it for purposes of assessing whether a reliability need occurs in the planning horizon. (*Id.*)

The Commission relied on the evidence present in the record in deciding to adopt SDG&E's proposed load forecast. The ISO supported our adoption of SDG&E's load forecast in the proceeding, and it has not provided us

with any evidence as to why we should change our position on this issue. Therefore, the ISO's argument is without merit.

3. Characterization of Support from Mexico.

The ISO's final argument is that we erred by characterizing as conservative the fact that we did not include support from Mexico in our analysis. (ISO App. for Rehearing at 22.) Rather, the ISO believes that our determination not to consider through flow support from Mexico should be characterized as reasonable. (ISO App. for Rehearing at 24.) There is sufficient evidence in the record to support our characterization of the record. (See D.02-12-066 at 47; SSRC Reply Brief at 39.) Therefore, the ISO's argument lacks merit.

IV. CONCLUSION

We have carefully considered all of the arguments presented by SDG&E and the ISO and are of the opinion that good cause for rehearing has not been shown. We conclude that no legal error has been demonstrated.

For the reasons stated above, SDG&E's and the ISO's applications for rehearing are denied.

Therefore **IT IS ORDERED** that:

1. Rehearing of D.02-12-066 is hereby denied.
2. This proceeding is closed.

Dated May 8, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners